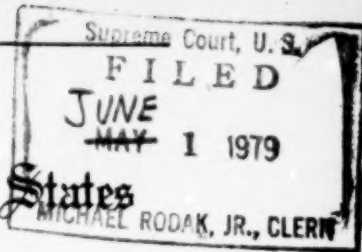


In The

Supreme Court of the United States



October Term, 1978

No. 78-1796

M. MAURICE GRAHAM and DAVID GOLDBERG,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

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In The

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October Term, 1978

No.

M. MAURICE GRAHAM and DAVID GOLDBERG,

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vs.

UNITED STATES OF AMERICA,

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
SECOND CIRCUIT**

The petitioners M. Maurice Graham and David Goldberg pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered in the above entitled action on May 9, 1979, which order affirms the denial of the petitioners' motion for an order, pursuant to the provisions of Rule 81(b), Federal Rules of Civil Procedure, said order, if granted would have required respondent to enforce the rules, regulations and practices promulgated by respondent in the Tariff Act of 1930, 19 United States Code, 46 Stat. 590.

The summary order of the court below at this time is unreported and is printed herein at Appendix A.

## JURISDICTIONAL STATEMENT

The statutory provisions believed to confer jurisdiction on this Court to review the decree dated May 9, 1979 is found at 28 U.S.C. §§2106 and 1651(a).

## QUESTIONS PRESENTED

1. Whether the respondent may lawfully ignore or refuse to enforce the "national customs policy", the Tariff Act of 1930, 19 United States Code, 46 Stat. 590.

2. Whether respondent has rightfully deprived the petitioners of a forum in which to litigate their substantive obligations under Title 19 United States Code.

3. The ultimate question that arises is whether the respondent's calculated refusal to protect the fiduciary relationship that existed between the parties under the provisions of the Tariff Act of 1930, prevents the respondent from complaining that the petitioners defaulted in their responsibility to the respondent under the provisions of the Revenue Act of 1954.

## BASIS OF FEDERAL JURISDICTION

Federal jurisdiction in the court of first instance was conferred upon the court by Title 28 U.S.C. §§1340 and 1345 and Title 26 U.S.C. §7402.

The petitioners leave to every man, the right to decide for himself whether petitioners' difficulties, yesterday, today and tomorrow, with the income tax collector of the United States Treasury Department, have or have not arisen from violations of the Tariff Act of 1930 or from the extension of the executive authority to levy duties, excises, imposts or assessments on imported merchandise, contrary to the classifications and

schedules enumerated in Title 19 United States Code (TSUS), which said tariff schedules list coffee (§160.10); cocoa beans (§156.10); crude rubber (§ ShPt 4-403); tea (§160.50) as "*duty free*". (Emphasis added.)

## STATEMENT OF FACTS

The records of the United States Customhouse in Customs District 10 show that the petitioners were duly licensed from 1925 until on or about June 15, 1958, and identification card-carrying United States Customhouse cartage cartmen and held such licenses under the provisions of 19 U.S.C. §112.49 and 19 U.S.C. §112.41(D). 19 U.S.C. §125.21(C) reads as follows:

"Any licensed customhouse cartage cartman, including an importer licensed to cart his own imported merchandise, at the expense of the importer or other party in interest, may transfer merchandise from the importing vessel or other conveyance to bonded warehouse, from one vessel or conveyance to another, from one bonded warehouse to another, from public stores to a bonded warehouse, from warehouse for transportation or for exportation, *under the internal revenue laws without payment of tax.*" (Emphasis added.)

Notwithstanding the provisions set forth in 19 U.S.C. and during all of the times mentioned from December 1953 until or about June 15, 1958 — further to and including October 1, 1975 — the following appeared in the Federal Register:

"FEDERAL MARITIME BOARD  
AGREEMENT 8005, Approved March 23, 1955

MEMORANDUM OF COOPERATIVE  
WORKING AGREEMENT RELATIVE TO

**CHARGES FOR LOADING OR UNLOADING WATERBORNE FREIGHT ONTO OR FROM TRUCKS AT PIERS OR OTHER WATERFRONT TERMINALS IN THE PORT OF GREATER NEW YORK AND VICINITY.**

1. That they shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to such services. . . .

2. That they shall assess and collect rates and charges for and in connection with such services strictly in accordance with rates, charges, classifications, rules, regulations and practices set forth in said tariffs. . . ."

"TARIFF NUMBER 4, FEDERAL MARITIME BOARD AGREEMENT 8005-1, Approved August 19, 1957

**RIGHT TO LOAD AND UNLOAD TRUCKS**

1. (a) The tariff may contain rules, regulations and practices prohibiting the loading of trucks at the piers or other waterfront terminals in said port by anyone other than the operators of said piers and waterfront terminals."

"NEW YORK MARINE TERMINAL TARIFF NO. 2, FEDERAL MARITIME COMMISSION NO. 16, Item No. 2, page 21, Approved October 1, 1975.

**RIGHT TO LOAD AND UNLOAD TRUCKS**

A. Truck loading shall be performed solely by the agents, servants and employees of a participating member in accordance with the rules, regulations and practices contained in this tariff. . . ."

**REASONS FOR GRANTING THE WRIT**

1. Petitioners aver and verily believe that the issues presented in this dispute are more important, serious, substantive and grave to the population of the country than the "exclusive privilege" heretofore struck down by this Court in the "steamboat" case of *Gibbons v. Ogden*, 9 Wheat. 1, so that this Court is justified in exercising jurisdiction for the reason that the executive authority has granted an exclusive and primary right or privilege to private enterprises operating in Customs District 10, to collect, assess and retain, imposts, duties, excises and assessments on imports that are superior to the regulations of the United States Customs in Customs District 10 and the Tariff Act of 1930, 19 United States Code.

2. The decree sought to be reviewed is erroneous in that examination of the "record book" in this dispute is absent of any previous appeal of an order denying a motion brought under Rule 81(b) of the Federal Rules of Civil Procedure (Appendix B, *infra*).



### CONCLUSION

Wherefore, your petitioners pray that this Honorable Court will cause the writ of certiorari to be issued pursuant to the power vested in this Court at 28 U.S.C. §§1651(a) and 2106, or in the alternative that this cause of action be remanded to the District Court for the Eastern District of New York, to be heard *de novo*.

Respectfully submitted,

s/ M. Maurice Graham  
*Attorney for Petitioners, pro se*

### CERTIFICATION

The petitioner M. Maurice Graham has read this petition consisting of 6 pages. The petitioner fully understands this statement and that it is true and accurate within the petitioner's belief and personal knowledge. I have made this statement freely and voluntarily, without any threats or promises of reward having been made to me as an informer in return for it and I pray that a writ of certiorari issue so that the \$377,500.63 which the waterfront terminal operators took from the petitioners, against their will, will be deposited into the Treasury of the United States so that the Treasury Department's claim for income taxes of \$20,111.45 may be fully paid.

s/ M. Maurice Graham  
*Attorney for Petitioners, pro se*

### APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

#### UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-nine.

Present:

HON. MURRAY I. GURFEIN  
HON. THOMAS J. MESKILL, *Circuit Judges*  
HON. CHARLES E. WYZANSKI, *Senior District Judge*

UNITED STATES OF AMERICA,

Appellee,

-against-

M. MAURICE GRAHAM,

Defendant-Appellant,

-and-

DAVID GOLDBERG,

Defendant.

79-6011

Filed May 9, 1978

*Appendix A*

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the appeal is dismissed since appellant is precluded from taking a second appeal on an issue previously unsuccessfully appealed by him. Appeal dismissed.

s/ Murray I. Gurfein  
MURRAY I. GURFEIN, U.S.C.J.

s/ Thomas J. Meskill  
THOMAS J. MESKILL, U.S.C.J.

s/ Charles E. Wyzanski  
CHARLES E. WYZANSKI, Senior D.J.  
Sitting by Designation

**APPENDIX B — PETITIONING LETTER DATED MAY 12, 1979**

May 12, 1979

HON. MURRAY I. GURFEIN  
HON. THOMAS J. MESKILL      Circuit Judges  
HON. CHARLES E. WYZANSKI,      Senior District Judge

May it please this Honorable Court in re: 79-6011:

The undersigned respectfully begs leave to inquire when at a stated term of the United States Court of Appeals for the Second Circuit a previous appeal on an issue involving the merits of a motion under rule 81(b) Rules of Civil Procedure was unsuccessfully appealed or argued on behalf of appellant in this dispute before this Court.

The appellant would appreciate such information.

Your obedient servant,

M. MAURICE GRAHAM

cc: Hon. Edward R. Korman  
US Attorney Eastern District of New York

No. 78-1796

Supreme Court, U. S.

FILED

JUL 12 1978

MICHAEL GRIFFIN, JR., CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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M. MAURICE GRAHAM AND DAVID GOLDBERG,  
PETITIONERS

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT

---

MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION

---

WADE H. MCCREE, JR.  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*

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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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No. 78-1796

**M. MAURICE GRAHAM AND DAVID GOLDBERG,  
PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

---

***ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT***

---

**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

---

Petitioners seek review of the decision of the court of appeals dismissing their appeal on the ground that it had already been the subject of an unsuccessful previous appeal.

The pertinent facts are as follows: On August 25, 1964, the government brought an action against petitioners in the United States District Court for the Eastern District of New York, seeking to reduce to judgment the unpaid portion of five tax assessments made against them totalling \$20,111.45. The government claimed that petitioners were liable under 26 U.S.C. 6672 because of their status as responsible officers of Rivoli Trucking Corporation, their closely held corporation (R. 6a-8a).<sup>1</sup>

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<sup>1</sup>"R." refers to the record appendix filed in the court of appeals.

On September 17, 1954, petitioners filed a counterclaim for \$331,626.35 under 28 U.S.C. 1346(b) (the Federal Tort Claims Act). The counterclaim alleged that they were injured because the Federal Maritime Board negligently caused Rivoli Trucking Corporation to pay pier operators for the loading and unloading of the trucks of Rivoli (R. 2a, 13a-18a).

The district court granted summary judgment for the government on its tax claim, finding that petitioners willfully failed to pay over to the United States the taxes they withheld as responsible officers of Rivoli Trucking Corporation (R. 19a-31a). The court dismissed petitioners' counterclaim. After describing the history of petitioners' unsuccessful previous attempts to litigate their claim for damages, the district court found that petitioners failed to state a claim upon which relief could be granted and that, at all events, the statute of limitations had expired (R. 24a-30a). Although petitioners filed a notice of appeal from this decision, the court of appeals dismissed the appeal for failure to prosecute (R. 3a, 32a-33a).

In 1975, petitioners filed a motion in the district court under Fed. R. Civ. P. 60(b), for relief from the 1966 judgment. On April 14, 1976, the district court denied the motion (R. 32a-35a). Petitioners' appeal was dismissed by the court of appeals (R. 3a-4a).

In late May 1978, petitioners filed another motion for relief from the 1966 judgment. In an order dated November 20, 1978, the district court denied the motion for the same reasons it denied the previous motion more than two years earlier on April 14, 1976 (R. 4a, 50a). On January 9, 1979, petitioners filed a notice of appeal from this order (R. 4a). On May 9, 1979, the court of appeals

dismissed the appeal on the ground that the subject of the appeal was identical to that of the unsuccessful previous appeal (Pet. App. 1a-2a).

The court of appeals correctly dismissed the appeal. As this Court observed in *Thompson v. Maxwell Land Grant Co.*, 168 U.S. 451, 456 (1897), "[i]t is the settled law of this court \* \* \* that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit." See also *Burnside v. Eastern Airlines, Inc.*, 519 F. 2d 1127 (5th Cir. 1975).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
Solicitor General

JULY 1979